Supreme Court, U.S.
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No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Department of Justice argues that an otherwise unconstitutional regulatory scheme can be sustained whenever it is applied to a business entity. If nothing else, its contention has the virtue of consistency with the position previously staked out by the prior administration in cases such as *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), and *Gibbs v. Babbit*, 214 F.3d 483 (4th Cir. 2000). But this Court *rejected* the identical argument in *SWANCC* that the Department again advances here. Thus, far from undermining the importance of Petitioner's request for a writ of certiorari, the Government's response actually demonstrates just why a writ of certiorari should issue in this case to counteract the persistent refusal of both the lower courts and the Department of Justice itself to follow this Court's opinion in *SWANCC*.

Moreover, the Government's suggestion that the Endangered Species Act, 16 U.S.C. §§ 1531-44, is simply not enforced against non-commercial entities is not only legally irrelevant, but erroneous as a factual matter. Countless private individuals have been caught up in ESA's regulatory snare, and the fact that most do not have the resources to fight the Government's unconstitutional regulatory regime to a published court decision does not make the Government's overreach any the less problematic. The simple fact remains that ESA "by its terms" aims at conduct that is neither commerce nor interstate in nature. The particular conduct at issue here—the erection of a fence and the proposed grading of some land—is itself neither commerce nor interstate, even though engaged in by a business entity. Were the court of appeals' decision correct, this Court's long-standing concern with protecting the line between that which is national and that which is truly local would be rendered meaningless. In any event, the decision below is "conspicuously in conflict" with a decision by the Fifth Circuit on this important post-*Lopez* issue, a conflict that requires this Court's review.

I. The Commerce Clause Does Not Permit Regulation of Local, Intrastate Activity that Has No Substantial Effect on Commerce Merely Because the Conduct May Be Undertaken By Economic Actors.

The Government's principal contention is that certiorari is not warranted in this case because the Court of Appeals decision below is fully consistent with this Court's recent Commerce Clause jurisprudence, which, according to the Government, recognizes that Congress' power to regulate commerce among the states is broad enough to reach *any* activity undertaken by commercial entities, no matter how local or insignificant to interstate commerce, and no matter whether the statute actually by its terms even addresses commerce or has any jurisdictional element that would limit its reach to conduct affecting interstate commerce.

The Government's contention is strikingly similar to the argument it made in *SWANCC*, where it was rejected (or at least called into serious doubt) by a majority of this Court.

At page 8 of its opposition brief, for example, the Government embraced the Court of Appeals' holding "that petitioner could not avoid the application of ESA Section 9 to its own commercial activities based on the possibility of hypothetical applications of the statute to non-economic conduct." In its merits brief in *SWANCC*, the Government made the identical point, even using the same "hypothetical applications" phrasing:

> The proposed activity for which petitioner sought a permit is commercial in character, and it would have a substantial impact on the bird species that use the area for habitat. The Court's inquiry should focus on the facts of this case, rather than on hypothetical applications of the Corps' jurisdictional rule to non-economic conduct.

SWANCC, Gov't Merits Br., at 13.

Similarly, the Government here seeks to distinguish *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), by noting that the "regulated activity is [petitioner's] planned commercial development, not the arroyo toad that it threatens." Gov't Opp. at 11. In *SWANCC*, the Government repeatedly pitched the same distinction: "The activities for which petitioner sought a Section 404 permit are of a commercial character." *SWANCC*, Gov't Merits Br., at 37; *see also id.*, at 43 ("The proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature"); *id.* at 44 ("Notwithstanding the commercial character of petitioner's own proposed activities, and the undisputed impact of those activities on migratory birds, petitioner's argument focuses largely on hypothetical situations not before the Court").

The Government's arguments in *SWANCC* were thought to raise such "significant constitutional questions" that this Court was unwilling to afford deference to the Corps of Engineers' interpretation of the Clean Water Act as authorizing the regulation of wholly intrastate, non-navigable waters merely because they might be visited by migratory birds, even where the particular conduct at issue was a clearly commercial waste disposal operation.[1] Indeed, this Court all but rejected the Government's claim that commercial conduct could be regulated even though the express terms of the statute were not addressed to commercial conduct:

> [W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects inter-

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[1] It should be noted that Petitioner has repeatedly disputed the Government's claim that the conduct at issue here was commercial. As Judge Sentelle noted in his dissent from the denial of rehearing below, "[g]round preparation and erection of a fence are not commerce, and certainly not interstate. Even the construction of houses hardly constitutes interstate commerce." Pet. App. 36a (Sentelle, J., dissenting from denial of petition for rehearing en banc).

> state commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute *by its terms* extends.

SWANCC, 531 U.S., at 173 (second emphasis added); *see also* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 J. Land Use & Envtl. L. 91, 107 (2003).

In other words, a majority of this Court has already expressed serious constitutional doubt about, if not effectively rejected, the Government's contention that an environmental regulation can be applied to commercial actors even where the statute "by its terms" has no connection with interstate commerce.[2]

At best (from the Government's perspective), whether the Commerce Clause permits such a broad reach as was urged by the Government and sanctioned by the court below is an open question after *SWANCC*. At worst, the Government's position, like that of the Court of Appeals below, ignores the strong admonition of this Court in *SWANCC*. In either case, certiorari is warranted to clarify just what is permitted under the understanding of the Commerce Clause reaffirmed in *SWANCC*.

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[2] The Government's reliance on *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973), misses Petitioner's point, and that of this Court in *Lopez*, *Morrison*, and *SWANCC*. Petitioner is not seeking to raise the unconstitutionality claims of third parties; it is rather seeking to challenge the constitutionality of the arroyo toad listing in all its applications, as a regulation that exceeds the scope of Commerce Clause authority because "by its terms" it does not even mention, much less aim at, interstate commerce or conduct that substantially effects interstate commerce.

II. The ESA Is Neither Aimed At, Nor Exclusively Used Against, Economic Actors.

The Government's second (and related) contention is that the extension of the ESA to wholly intrastate, non-commercial species such as the arroyo toad at issue here (or the cave bugs at issue in *GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)) is a permissible exercise of Congress's Commerce Clause authority because most of the conduct actually prohibited by such regulatory extensions will be undertaken by economic actors. Indeed, the Government goes so far as to imply that that the ESA has *never* been applied to non-economic conduct, stating that "petitioner identifies *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly non-economic purposes." Gov't Opp. at 13 (emphasis in original).

The Government's contention is legally irrelevant, and the implication it seeks to draw from its factual assertion is patently false, in any event. Moreover, the explicitly acknowledged split on this rationale between the D.C. Circuit here and the Fifth Circuit in *GDF Realty* warrants this Court's attention.

A. The Extent of Commercial Activity Covered by a Regulatory Scheme Is Irrelevant To Whether The Statute "By Its Terms" Aims At Conduct Within the Scope of the Commerce Power.

Seeking to distinguish this Court's decision in *Lopez* (which involved, as the Government candidly acknowledges, the *sale* of a gun), the Government contends that the extension of the ESA to the arroyo toad is permissible because most of the activity prohibited as a result will "characteristically result from economic activity." Gov't. Opp. 11 n.3. The Government made that point, too, in *SWANCC*. It described the case as "representative" because the "loss of migratory bird habitat has been caused overwhelmingly by commercial activities—agricultural and industrial development, urbaniza-

tion, and other commercial development," and it sought to distinguish *Lopez* by claiming that the "commercial nexus" between Lopez's gun possession and attempt sale was "legally irrelevant to Lopez's guilt." *SWANCC*, Gov't Merits Br. at 45 and n.38. Again, this Court rejected the Government's contention in *SWANCC*, stating that the courts were to focus on the "precise conduct" that the statute prohibited "by its terms." Certiorari is warranted to reject the identical contention here, as well.

B. The Government Has Enforced the ESA Against, or Required Permits of, Countless Non-Ecomonic Actors.

Moreover, even if the number of economic actors reached by a regulatory scheme was somehow relevant to the issue whether the statute "by its terms" reaches conduct that is within the Commerce Clause authority of the federal government, the Government is simply wrong to suggest that the ESA is rarely, if ever, enforced against non-economic actors. Countless private individuals have been forced to seek federal permits for non-economic activity on their own land. It would take a more thorough review of the thousands of Section 9 violation letters issued every year by the Fish & Wildlife Service than is possible here, but there are more than enough cases that actually resulted in litigation to refute the Government's point.

John Taylor v. United States, No. 99-131-L (Fed. Cl. 1999), for example, was an inverse condemnation case challenging the Fish & Wildlife Service's refusal to allow Taylor to build a house on his own property because of the presence of a bald eagle next on an adjoining parcel. *United States v. St. Onge*, 676 F. Supp. 1044 (Dist. Mon. 1988), involved a prosecution of a recreational hunter for mistakenly shooting a grizzly bear. *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fl. 1987), involved the prosecution of the chairman of the Seminole Indian Tribe for "taking" a Florida panther for use by the tribe's medicine man. In *United States v. McKittrick*,

142 F.3d 1170 (9th Cir. 1998), McKittrick was prosecuted for killing a gray wolf that had strayed from its habitat in Yellowstone National Park. And *Gibbs* arose as the result of the criminal prosecution of a farmer who shot a red wolf that was on his land, threatening his livestock. The farmer, as well as county officials, challenged the constitutionality of the red wolf listing and federal government's program re-introducing red wolves in areas where they could threaten people, family pets and livestock on private land. 214 F.3d, at 489; *cf. State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (N.Y. App. Div. 2000) (holding that private landowner's construction of a snake-proof fence to keep timber rattlesnakes from a nearby den off his property violated the state's ESA).

The Government will undoubtedly contend that some (or all) of these cases involved economic conduct, much as it contended in *SWANCC* that "a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor ... may be regarded as quasi-economic in essentially the same way as the homegrown wheat production and consumption that was at issue in Wickard." *SWANCC*, Gov't Merits Br. at 46 n.37. But such a breathtakingly broad understanding of "economic" activity would clearly obliterate any distinction between national and local activity, and destroy any remaining limits on the scope of federal power.

Moreover, even if the Government declined to prosecute ESA violations against non-economic actors, the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g), nevertheless subject such actors to significant civil liability. *Shields v. Babbitt*, 229 F.Supp.2d 638 (W.D.Tex., 2000), *rev'd on justiciability grounds sub nom. Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002), for example, arose out of a threatened suit by the Sierra Club against a private landowner for alleged "takes" of wholly intrastate species.

Perhaps even more fundamentally, the refusal by the Fish and Wildlife Service to give permits to non-economic actors

will often not be "litigated," but can nevertheless have devastating consequences. As noted in the *amicus* brief filed by Texas on behalf of several States in support of the instant petition, the Service's refusal to permit controlled burns by California forestry officials for six years running because of the potential harm to potential arroyo toad habitat was a contributing cause of the wildfires that burned over 730,000 acres of forest, destroyed nearly 4,000 homes, and claimed at least 20 lives in southern California last October. Texas Amicus Br. at 3; Ben Goad & Jennifer Bowles, *Fire Official Faults Agency*, THE PRESS-ENTERPRISE, Dec. 16, 2003, at A01; Jia-Rui Chong, *California; Federal Agency Faulted in Fires*, LOS ANGELES TIMES, Dec. 15, 2003, at B1; Jennifer Muir, *Sometimes It Looked Like a Nuclear War*, THE ORANGE COUNTY REGISTER, Nov. 14, 2003, at A1.

The Service's refusal to grant the requested permits had no connection whatsoever with interstate commerce, and was not aimed at business entities. It was, instead, a massive intrusion on the reserved powers of the States and dispositive proof that the centralized command-and-control regulatory apparatus of the ESA, at least as applied to wholly intrastate, non-commercial species, is more than just unconstitutional—it is devastatingly bad policy as well.

C. The Split In Rationales Between the D.C. Circuit and the Fifth Circuit Is Real, and Significant.

Finally, the Government discounts—even misrepresents—the extent and significance of the split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in this case, describing the decisions as merely employing "somewhat different rationales." Opp. 17.[3] The rationales relied upon by

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[3] The Government also sets up a straw man by erroneously asserting that Rancho Viejo contended that there was a decisional circuit split, rather than the split in rationales among the circuits that Rancho Viejo actually asserted. *See* Opp. 15 ("Contrary to petitioner's contention, the court of appeals' decision in this case does not conflict with any decision of another circuit"). The Government later retracted this straw man argument.

the two circuits were not just "somewhat different," but actually and explicitly contradictory, as though the courts were reading "two different statutes." Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 Yale L. J. 947, 947 (2004).

The Government does not even address, and therefore apparently concedes, Rancho Viejo's argument regarding the split in how the D.C. Circuit and the Fifth Circuit have addressed the biodiversity rationale. Yet the fact remains that the D.C. Circuit, per Judge Wald in *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), expressly rejected the biodiversity rationale—the only rationale accepted by the Fifth Circuit—in non-total extinction, portion-of-the-range cases such as this.

The extent of the split in rationales is perhaps most clear in how the two circuits treated the commercial nature of the regulated actor. The Government erroneously claims that the Fifth Circuit in *GDF Realty* "appeared to attach some (though not dispositive) significance to the fact that the specific takes at issue in the case would occur as a result of plaintiffs' planned commercial development.'" Opp. 17-18 (citing *GDF Realty*, 326 F.3d at 639). In truth, as Petitioner noted in its petition, the Fifth Circuit's refusal to give *any* significance to the GDF Realty's commercial development—a proposed Wal-Mart store—could not have been more clear:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that ... Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.... To accept [such an] analysis would

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Opp. 16 ("In asserting that a circuit conflict exists, petitioner principally argues that the court of appeals' *reasoning* in this case is inconsistent with the Fifth Circuit's analysis in *GDF Realty*").

> allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.

GDF Realty, 326 F.3d, at 634-35. As Judge Sentelle pointed out, the Fifth Circuit's rejection of the Congress-can-regulate-anything-a-business-does rationale is "conspicuously in conflict" with the decision of the D.C. Circuit below. Pet. App. 35a.[4]

CONCLUSION

For the reasons stated above and previously, the petition for writ of certiorari should be granted.

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[4] The Government's reliance on *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827), and its progeny for the unexceptional proposition that this Court "reviews judgments, not statements in opinions," is misplaced. The proposition applies in the context of a successful party who seeks to challenge the reasoning of a lower court decision in its favor. *See Sea-Land Serv. v. DOT*, 137 F.3d 640 (D.C. Cir. 1998) (citing, e.g., *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939)). Moreover, Rancho Viejo has not taken some statement from the D.C. Circuit's opinion out of context, but has contended that the circuit courts' rejection of each other's reasoning undermines those courts' decisions upholding the constitutional of the ESA as applied to wholly intrastate, non-commercial species and therefore warrants this Court's review.

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